required in order to relieve him from liability; nor will a mere notice by the surety to the creditor that he would no longer consider himself bound, and requesting him to take another bond or payment, absolve the surety.[8]

G. H. B.

CARRIERS—CAR DISTRIBUTION—COMPANY FUEL CARS.

As a common carrier, a railroad is required to furnish all facilities necessary for transportation, including cars, a supply of which must be afforded sufficient to accommodate the traffic offered. It is not incumbent, however, upon a railroad to furnish sufficient specialized cars to meet the demand therefor at all times. Such cars must necessarily remain idle except when required by the traffic to which they are particularly adapted, and for that reason a railroad is held to have discharged its obligation by furnishing enough of such cars to meet the average demand.[1] Coal cars are suited only to the transportation of coal, and are, therefore, within this rule. As the output of bituminous coal fluctuates in a marked degree, as a result of the varying demand for that commodity, and as the lack of storage facilities at the mine makes it imperative that the coal be taken by the carrier at the mouth of the mine, it follows that at certain periods it is impossible for the carrier to supply all shippers with a sufficient number of cars to enable them to meet the market demand for coal. In such periods it is the duty of the carrier to pro-rate the available cars among all shippers in a particular district, so that none will be put at a disadvantage as regards his competitors.[2]

In order to arrive at a fair and just distribution of available cars, it is necessary, first, that the capacity of each mine in the district under consideration be ascertained, and, second, that an equitable scheme for the allotment of cars in shortage periods, in proportion to the capacities of the mines, be fixed upon. The question of determining the capacity of a mine is not strictly a judicial one, and it is not within the scope of the present note to discuss the various schemes for ascertaining capacity that have been passed upon by the courts. Suffice it to give the following statement by Judge Goff of the factors that

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[8] *Greenawalt* v. *Kreider*, 3 Barr. 264.

[1] U. S. *ex rel. Pitcairn Coal Co.* v. *B. & O. R. Co.*, 165 Fed. 113, 119, (reversed on a question of jurisdiction by the United States Supreme Court, Jan. 10, 1910).

[2] § 3, Act to Regulate Commerce, as amended by Act of June 29, 1906, 34 Statutes at Large, 584.

must be considered. "The capacity of a coal mine for rating purposes is the amount of coal it is able to place in the railroad cars in a given time, and that depends on its working places, the thickness of its coal seams, its switches, workmen, mine cars and tipples, its general equipment and its management."[3]

It is the method of distribution of cars after the capacities of the various mines have been ascertained, that gives rise to difficulties. There are four classes of cars that must be included in making distribution; system cars, those belonging to the railroad and devoted to general use; private cars, those belonging to mine operators; foreign railway fuel cars, those belonging to a connecting carrier, assigned by it to particular mines for the purpose of obtaining fuel coal; company fuel cars, those belonging to the carrier touching the mines in question, and assigned by it to particular mines for fuel coal.

System cars are affected by no consideration varying the general rule, and must, of course, be apportioned ratably according to the respective capacities of the mines.

Private cars have afforded some difficulty in the past, but it is now settled that they must be counted against the percentage of system cars to which any mine is entitled in shortage periods,[4] but a mine is entitled to all the cars that it owns although they exceed the number of system cars to which it would be entitled in the absence of such ownership.[5] The ground for this rule is that, as it is the duty of the railroad, and not of the shipper, to furnish cars, all cars in use must be considered as belonging to the railroad, no matter how obtained by it.[6] This rule is justified by the consideration that private cars constitute a tax upon the transportation facilities of the carrier, to only a ratable share of which the owner of private cars is

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[3] U. S. *ex rel. Kingwood Coal Co.* v. *W. Va. N. R. Co.* 125 Fed. 252, 256.

[4] *R. R. Com. of Ohio* v. *H. V. R. Co.*, 12 Interst. Com. Rep. 398, 411; *Rail & River Coal Co.* v. *B. & O. R. Co.*, 14 I. C. C. Rep. 86, 91; U. S. *ex rel. Coffman* v. *N. & W. Ry. Co.*, 109 Fed. 831, 837; *Logan Coal Co.* v. *P. R. Co.* 154 Fed. 497, 503; U. S. *ex rel. Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 165 Fed 113, 126, (reversed on a question of jurisdiction by United States Supreme Court on Jan. 10, 1910); *Traer* v. *Chi. & Alt. R. Co.*, 13 Interst. Com. Rep. 451, 458.

[5] *R. R. Com. of Ohio* v. *H. V. R. Co.*, 12 Interst. Com. Rep. 398, 411; *Rail & River Coal Co.* v. *B. & O. R. Co.* 14 I. C. C. Rep. 86, 92; *Traer* v. *Chi. & Alt. R Co.*, 13 Interst. Com. Rep. 451, 458.

[6] *Shamberg* v. *D., L. & W. R. Co.*, 4 I. C. C. Rep. 630, 660; *Rice* v. *W. N. Y. & P. R. Co.*, 4 I. C. C. Rep. 131, 149; *Refiner's Association* v. *W. N. Y. & P. R. Co.* 5 I. C. C. Rep. 415, 434; *In re* Transportation of Fruit, 11 Interst. Com. Rep. 129, 137.

entitled.[7] With this proposition in view it is difficult logically to justify the latter part of the rule, giving a mine operator the use of all his private cars at all events; but as a practical proposition, its fairness seems unquestionable.

The same rule has finally been settled upon with regard to foreign railway fuel cars. Those consigned to a particular mine must be counted against its percentage, but it is entitled to all cars so consigned though they exceed its percentage,[8] and this rule has been adhered to in the face of objections by the company assigning the cars.

Company fuel cars also are governed by the same rule of distribution,[9] but a stubborn fight was made against it by both the shippers and the railroads, and the question was finally settled only by an appeal to the United States Supreme Court.[10] The argument against counting domestic fuel cars, which prevailed in the Circuit Court, is as follows: "Commerce in this instance (company fuel cars) ends at the tipples. From there on * * * there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. * * * It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are used in handling their own fuel."[11]

On appeal, the Supreme Court, reversing the Circuit Court and affirming the Commission, held that in reviewing a decision of the Commission only three questions were open for consideration, (1) relevant questions of constitutional power and right, (2) whether the scope of the delegated power had been exceeded in form, (3) whether the scope of such authority had been exceeded in substance. It then held that the question of taking account of company fuel cars for purposes of distribution was within the jurisdiction of the Commission, as com-

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[7] *Logan Coal Co.* v. *P. R. Co.*, 154 Fed. 497, 503, *Rail & River Coal Co.* v. *B. & O. R. Co.*, 14 S. C. C. Rep. 86, 92.

[8] *R. R. Com. of O.* v. *H. V. R. Co.*, 12 Interst. Com. Rep. 398, 405; *Traer* v. *Chi. & Alt. R. Co.*, 13 Interst. Com. Rep. 451, 458; *Rail & River Coal Co.* v. *B. & O. R. Co.*, 14 I. C. C. Rep. 86, 91; *Logan Coal Co.* v. *P. R. Co.* 154 Fed 497, 503; U. S. *ex rel. Pitcairn Coal Co.* v. *B. & O. R. Co.*, 165 Fed. 113, 126, (reversed on a question of jurisdiction by United States Supreme Court, Jan. 10, 1910).

[9] *Traer* v. *Chi. & Alton R. Co.*, 13 Interst. Com. Rep. 451, 458; *Logan Coal Co.* v. *P. R. Co.*, 154 Fed. 497, 503; U. S. *ex rel. Pitcairn Coal Co.* v. *B. & O. R. Co.*, 165 Fed. 113, 126 (reversed on a question of jurisdiction by United States Supreme Court, (Jan. 10, 1910).

[10] *I. C. C.* v. *Ill. Cent. R. Co.*, 215 U. S., (Jan. 10, 1910).

[11] *Chi. & Alt. R. Co.* v. *I. C. C.*, 173 Fed. 930, 933.

merce excludes all transportation whether commercial or not, and all equipment used therein. After disposing of a question of the power of the Commission arising in connection with the construction of section 4 of the act, the Court then takes up a number of logical objections to the rule laid down by it and dismisses them with the remark that they merely suggest the complexity of the subject, and go only to the expediency of the Commission's order.

The whole attitude of the Court seems to be that it will not disturb a decision of the commission on questions within its jurisdiction and powers, as such questions are influenced by practical economic considerations, that should properly be left to the discretion of the commission as a body of experts. The indication is, therefore, that all the rules laid down by the Commission concerning the distribution of cars will be affirmed if taken to the United States Supreme Court.

E. S. B.